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SUPREME COURT, U.S.

No. 141, Original

RECORD AND BRIEFS

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

STATE OF NEW MEXICO'S SUR-REPLY TO THE REPLIES OF THE UNITED STATES, TEXAS, AND COLORADO

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INTRODUCTION

In this brief, the State of New Mexico responds to the Replies of the United States ("U.S. Reply"), the State of Texas ("Texas Reply"), and the State of Colorado ("Colorado Reply"). In addressing these filings only, New Mexico does not intend to imply agreement with arguments raised by *amici* El Paso County Water Improvement District No. 1 ("EPCWID"), Elephant Butte Irrigation District ("EBID"), the City of El Paso, or the State of Kansas.

The United States has moderated the position it took in its exceptions ("U.S. Br.") and now argues the Special Master's reasoning does not deprive New Mexico of sovereignty over water within its borders. U.S. Reply at 3-7. The United States contends the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact") imposes some limits on how New Mexico may exercise its authority over water within New Mexico south of Elephant Butte ("Lower Rio Grande"), while acknowledging the extent of these limitations has yet to be determined in these proceedings. *Id.* at 16. In response to Colorado, the United States asserts it is not limited to raising claims under the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 ("1906 Convention"), but may raise claims under reclamation law or the Compact itself. *Id.* at 16-20. Finally, the United States concedes there is

no reason for the Court to rely on the historical materials cited in the First Interim Report of the Special Master ("Report"). *Id.* at 23.

In contrast to the United States, Texas maintains the Report interpreted the Compact as depriving New Mexico of jurisdiction over water once it is delivered to Elephant Butte. Texas Reply at 6. Texas opposes New Mexico's exceptions ("N.M. Br.") challenging the Report's reasoning regarding New Mexico's sovereignty over water within the Lower Rio Grande, arguing this reasoning is necessary to support the Report's conclusions. *Id.* at 1. Texas argues New Mexico law and even federal reclamation law no longer apply to water delivered to Elephant Butte because the doctrine of equitable apportionment supersedes these authorities. *Id.* at 25, 28-29. Further, Texas supports the Special Master's historical discussion and citation to extrinsic materials, arguing the Master made no findings of fact. *Id.* at 36-37.

Responding to the United States' exceptions, Texas agrees with the United States that it should be allowed to raise Compact claims related to the Compact's equitable apportionment, but disputes the Special Master's recommendation that the United States should be allowed to raise claims under Reclamation law because, in Texas's view, "the doctrine of equitable apportionment, not Reclamation Law, governs the [Rio Grande] Project's delivery of apportioned water." *Id.* at 39-41. Finally, Texas urges the Court to reject the arguments raised by *amici* City of Las Cruces ("Las Cruces") and Albuquerque Bernalillo County Water Utility

Authority ("ABCWUA") as inconsistent with New Mexico's position. *Id.* at 41-44. It then argues the Court should deny the motions for leave to file of New Mexico State University ("NMSU") and the New Mexico Pecan Growers ("NMPG") because they duplicate New Mexico's arguments, and because Texas itself refused to consent to their motions. *Id.* at 45-48.

In its reply, Colorado addresses only the United States' exceptions, arguing the Compact grants the United States no right of action to protect water deliveries made pursuant to the 1906 Convention because the Compact's plain language expressly disavows any impact on the United States' international interests. Colo. Reply at 3. Colorado also asserts the Compact, as an agreement among the signatory States apportioning water among those States, creates no separately enforceable federal right of action. *Id.* at 6. Colorado argues the United States' participation in other original action water disputes confirms it has been allowed to participate to protect federal interests, like reclamation projects, treaty obligations, and the rights of Indian tribes, not to assert compact claims against a signatory State. *Id.* at 7-10. Finally, Colorado contends the United States is not a third-party beneficiary to the Compact, which directly benefits only the signatory States. *Id.* at 10-13.

SUMMARY OF ARGUMENT

All parties now agree with the Special Master's conclusion that the Compact incorporates the Rio Grande Project ("Project") to distribute the waters of the Rio Grande between Elephant Butte and Fort Quitman, Texas, although the manner of its incorporation is still in dispute. Beyond this, the Report's analysis has sparked confusion. For example, the United States now argues the Report does not interpret the Compact as a full revocation of New Mexico's sovereign jurisdiction over water within its own borders, but it argued in its exceptions that the Report concluded the Compact strips New Mexico of control and dominion over water delivered to Elephant Butte. Texas, by contrast, asserts the Report concluded the Compact's apportionment supersedes state law and reclamation law in the Lower Rio Grande. Colorado does not directly address New Mexico's sovereignty, but does argue the Compact contains no terms addressing Project operations. In spite of this confusion, the United States and New Mexico now generally agree that state law applies below Elephant Butte Dam, so long as it is not inconsistent with the Compact.

The parties also disagree regarding the proper treatment of the historical discussion in the Report, sometimes respecting the Master's disclaimer that the Report should not be construed as making findings of fact, but sometimes citing material from this discussion in support of their arguments. As evidenced by the confusion about the meaning and significance of the

Report, the Report's reasoning has created controversies unnecessary to decide the Motions to Dismiss and should not be adopted.

This confusion, and the potentially drastic consequences for New Mexico's sovereignty should the Report's reasoning be allowed to stand, demonstrates why the Court should disregard Texas's assertion that the Report should be adopted in full. The Court has declined to adopt the reasoning in special master reports in other cases, even when accepting those masters' recommendations. The Special Master's conclusion here that the Compact incorporates the Project as a means of distributing apportioned water to southern New Mexico and Texas supports the conclusion that Texas may bring a Compact claim alleging interference with the Project, rendering the other reasoning in the Report unnecessary and potentially prejudicial.

The Court also should not allow itself to be swayed by Texas's continued misrepresentation of New Mexico's arguments and position. New Mexico does not claim and has never argued that it has a right under the Compact, New Mexico law, or any other authority to deplete Texas's apportionment of water. Texas's repeated assertion that this is the case, whether intentional or not, interferes with the ability of the parties, the Special Master, and the Court to focus on the actual issues at hand.

Texas also fails to present any reason for the Court to conclude the Compact or the doctrine of equitable apportionment supersede all other sources of law in

the Lower Rio Grande. The cases Texas cites stand for the noncontroversial proposition that state law must respect the apportionment in a compact, not that a compact's apportionment completely supersedes all other sources of law governing the apportioned water, including reclamation law.

Nor does Texas offer a persuasive reason for the Court to disregard *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013) ("*Tarrant*"). *Tarrant*'s reasoning is not limited to the specific factual circumstances of that case but applies more broadly to any interpretation of an interstate compact. *Tarrant* is clearly relevant to the parties' disagreement over the legal implications of the term "deliver" in Article IV of the Compact.

Further, Texas's contradictory position that the arguments of *amici* Las Cruces and ABCWUA should be rejected as inconsistent with New Mexico's arguments while the motions for leave to file of *amici* NMSU and NMPG should be rejected because their arguments are too consistent with New Mexico's offers the Court no reason to disregard any of these *amici*'s briefs. Each of these *amici* provides important context on water and groundwater use in the Lower Rio Grande and the potential impacts of the Special Master's ruling on southern and central New Mexico.

Finally, New Mexico supports Colorado's Reply and agrees that the United States should not be allowed to raise claims based on the Compact. The Compact is meant to apportion the waters of the Rio

Grande among the signatory States, and the Compact's reliance on the Project as a means of distributing some of this water does not confer a Compact right of action on the United States to protect either Project operations or its treaty obligations. The United States may assert other causes of action to protect its interests in this area.

ARGUMENT

I. Response to the United States

A. The Parties' Differing Interpretations of the Report Demonstrate Why the Report's Reasoning Should Not Be Adopted.

The briefing on the Report has demonstrated that the parties do not agree on what the Report concludes. Although in its exceptions brief, the United States relied on those parts of the Report which undermine New Mexico's sovereignty, U.S. Br. at 23, 29, 34, 36-37, the United States in its Reply has modified this position. The United States' new position, more in keeping with federal law, argues the Report should not be interpreted to conclude New Mexico "literally cedes ownership of Rio Grande water in New Mexico to the United States (or anyone else) when it delivers water to the Project." U.S. Reply at 5. It urges that, "in the context of the entire Report," the Special Master's troubling statements about New Mexico's sovereignty should be interpreted to mean only that "New Mexico cannot administer water rights in a way that conflicts

with the Compact's equitable apportionment." *Id.* at 16. The United States insists New Mexico is merely "overreading . . . isolated statements in the Master's Report," and the Report does not have the sweeping implications New Mexico fears. *Id.* at 4.

If New Mexico is "overreading" the Report, then Texas does the same. Texas contends the Report concluded that, "once New Mexico has delivered that apportioned water to Elephant Butte Reservoir, it has relinquished jurisdiction over the distribution of that water." Texas Reply at 33. Elsewhere, Texas states the Report "correctly identifies the legal regime governing the delivery and distribution of Texas's Compact apportionment as the doctrine of equitable apportionment, not New Mexico state law." *Id.* at 25. Texas further argues New Mexico cannot "adjudicat[e] . . . rights to water that has already been equitably apportioned under the Rio Grande Compact." *Id.* at 32; *see also* EPCWID Reply at 3, 15.

The parties also disagree regarding the proper treatment of the historical discussion in the Report. They sometimes respect the Master's disclaimer that the Report should not be construed as making findings of fact, U.S. Reply at 22 (citing Report at 193), but sometimes cite material from this discussion in support of their arguments, U.S. Br. at 34 (citing Report at 120). Despite this, all parties save Texas now agree the Report's historical discussion is problematic and should be stricken, or do not oppose striking it. Colo. Br. at 9-13; N.M. Br. at 49-55; U.S. Reply at 23.

The parties' disagreement over the Report's meaning and implications demonstrates that the Report should be disavowed. If the Court simply denies New Mexico's Motion to Dismiss and remands the case to the Special Master without addressing the Report, the parties will continue to disagree over the Report's meaning. New Mexico and the United States will argue the Report should not be read expansively to deprive New Mexico of jurisdiction over water in the Lower Rio Grande, while Texas will insist this is now the law of the case. The Court should avoid this confusion by disavowing the Special Master's unnecessary reasoning regarding New Mexico's sovereignty when it denies the Motion to Dismiss Texas's Complaint.

Nor is there any reason for the Court to adopt the Report's reasoning in order for it to accept the Report's conclusions. *See* U.S. Reply at 23. It is not unusual for the Court to decline to adopt the reasoning in a special master's report while still accepting some or all of the master's conclusions.[1] *E.g.*, *South Carolina v. North*

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[1] Further, Texas suggests the Court should defer to the Report because the Court typically applies a "tacit presumption of correctness" to a special master's findings, Texas Reply at 9 (quoting *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984)). In addition to addressing findings of fact, not conclusions of law, *Colorado v. New Mexico* provides that "the ultimate responsibility" for deciding a case remains with the Court. 467 U.S. at 317. "[T]he Master's reports and recommendations are advisory only. . . . The Court itself determines all critical motions and grants or denies the ultimate relief sought. . . ." Eugene Gressman et al., *Supreme Court Practice* § 10.12, 643 (9th ed. 2007). Texas presents no persuasive reason for the Court to defer to the Report's problematic reasoning here.

Carolina, 558 U.S. 256 (2010) (accepting the special master's recommendation, but rejecting the master's proposed standard and rationale). In this instance, where the Report's reasoning is so unclear and its potential ramifications so drastic, the Court should explicitly decline to adopt the Special Master's flawed reasoning while accepting the ultimate conclusion—denial of the Motion to Dismiss Texas's Complaint. Further proceedings in this case, including discovery, will give the Court the opportunity to address the remaining issues in this case based upon properly gathered evidence.

B. The United States and New Mexico Agree the Compact Does Not Deprive New Mexico of Jurisdiction over Water Below Elephant Butte.

In its Reply, the United States agrees with New Mexico that neither the Compact nor the doctrine of equitable apportionment require New Mexico to relinquish sovereignty over water in the Lower Rio Grande. U.S. Reply at 6, 15-16. The United States also recognizes that New Mexico law continues to apply to Project water deliveries. *Id.* at 9. In so recognizing, the United States finally admits, as New Mexico has argued since the inception of this case, that "[s]tate law . . . protect[s] Project water deliveries (including to Texas and Mexico) from interference or impairment." *Id.* The United States cautions that the Compact imposes "limits on how [New Mexico] may exercise its authority over water," *id.* at 16, a point New Mexico has

never contested. New Mexico agrees with the United States that "[t]he extent of the limitations imposed by the Compact" have yet to be determined in this proceeding. *Id.*

The United States further agrees with New Mexico that this Court is not being asked to "determine or redetermine the Project's water right," *id.* at 13-14, and that the Court's interpretation of the Compact will instead "inform the state water adjudication, not usurp it," *id.* at 12. New Mexico is encouraged to hear the United States confirm that it has no intention of seeking to relitigate the scope of the Project right before this Court.

II. Response to Texas

A. The Report of the Special Master Should Not Be Adopted in Full.

Texas urges the Court to adopt the Report "in full," arguing that the Special Master's reasoning is necessary to support his conclusions.[2] Texas Reply at 1. This is incorrect. The Special Master's conclusion that the Compact incorporates the Project provides a Compact cause of action to protect Texas's apportionment in the Lower Rio Grande, which is sufficient for Texas's Complaint to survive a motion to dismiss. In addition, the

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[2] It is not clear why Texas argues the Report should be adopted in full, as Texas disagrees with the Report's conclusion that the United States' Complaint in Intervention should be limited to claims arising under reclamation law and 28 U.S.C. § 1251(b)(2). Texas Reply at 39-41.

Court has no obligation to accept the Report's reasoning to accept its conclusions. *South Carolina v. North Carolina*, 558 U.S. at 265, 276. All parties except Texas agree the Report should not be adopted in full. The Court need not and should not accept the Report's reasoning here.

New Mexico's Motion to Dismiss was submitted in good faith, and was based on an interpretation of the Compact that has been advanced in prior lower court opinions. *See* N.M. Br. at 7 (citing *City of El Paso ex rel. Public Service Board v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983) ("[T]he Rio Grande Compact does not apportion the surface waters of the Rio Grande below Elephant Butte between New Mexico and Texas.")). States involved in other compact disputes have similarly tested theories or interpretations of various compacts at the outset of litigation by means of motions to dismiss. *E.g.*, *Montana v. Wyoming*, 563 U.S. 368, 373 (2011).

New Mexico has accepted the Special Master's rejection of this theory and his conclusion that the Compact incorporates or relies on the Project as a means to distribute water apportioned to lower New Mexico and Texas. Accordingly, New Mexico elected not to take exception to the recommendation that its Motion to Dismiss Texas's Complaint be denied. While the Special Master should have ended his analysis with the conclusion regarding the Compact's incorporation of the Project, a point that definitively determined Texas had a Compact claim and could proceed, he went further,

making determinations that were incorrect and unnecessary for the reasons explained in New Mexico's exceptions. To avoid the confusion the Report has generated, and to prevent its sweeping and unnecessary conclusions from becoming the law of the case, the Court should disavow the Report's reasoning when denying New Mexico's Motion to Dismiss Texas's Complaint.

B. Texas Misstates New Mexico's Position.

Texas continues to misrepresent New Mexico's position before this Court. New Mexico has repeatedly disclaimed that it has a right arising under the Compact, New Mexico state law, or Reclamation law to deplete Project water allocated for delivery to Texas beneficiaries after its release from Elephant Butte. *See, e.g.*, N.M. Reply Br. on Mot. to Dismiss at 4; N.M. Br. at 24. Ignoring New Mexico's representations before the Special Master and to this Court, Texas argues New Mexico's "fundamental legal argument" is that New Mexico has a "Compact right to intercept, divert, and deplete water leaving Elephant Butte Reservoir before it crosses the New Mexico-Texas state line." Texas Reply at 5-6; *see also* Texas Reply at 22 ("New Mexico asserts that it may intercept and divert water leaving the Reservoir before it crosses the New Mexico-Texas state line because that water . . . is governed by New Mexico state water law." (internal quotation omitted)).

Texas's continued misrepresentation of New Mexico's position interferes with the ability of the Court, the Special Master, and the parties to address the actual legal issues presented by New Mexico's Motion to Dismiss, the Report, and the exceptions thereto. It is unclear whether Texas's mischaracterization of New Mexico's argument is intentional. Either way, New Mexico reiterates what has always been its position: acceptance of New Mexico's jurisdiction over water in the Lower Rio Grande does *not* allow New Mexico to unilaterally deplete Texas's apportionment. It *does* allow state law jurisdiction over water in accordance with Section 8 of the Reclamation Act and this Court's precedents. 43 U.S.C. § 383; *California v. United States*, 438 U.S. 645, 678 (1978) (recognizing that the exercise of a State's jurisdiction must be consistent with congressional directives).

Texas also misrepresents New Mexico's position when it asserts that New Mexico argues Texas's "sole remedy for redress of its Compact complaints are [sic] with the New Mexico State Engineer or the New Mexico Adjudication Court." Texas Reply at 28. On the contrary, by taking no exception to the Special Master's recommendation to deny its motion to dismiss, New Mexico has conceded Texas may pursue its claims in this forum. New Mexico also concedes that the question of whether and to what extent Texas has been injured, as well as the appropriate remedies for any injury, will be litigated in this forum.

In short, the case is ready to take the next steps to address the central issues in this dispute, which include the effect of groundwater pumping in both Texas and New Mexico, and whether Project operations under the 2008 Operating Agreement interfere with the Compact's apportionment of water in southern New Mexico and Texas by causing the United States to overdeliver water to Texas to the detriment of New Mexico.

C. The Compact Is Not Inconsistent with State Water Administration in the Lower Rio Grande.

Texas claims New Mexico's arguments regarding Section 8, the McCarran Amendment, and state law are irrelevant because the Compact "takes precedence" over these authorities. Texas Reply at 28-29, 31; *see also id.* at 40-41 ("[T]he doctrine of equitable apportionment, not Reclamation Law, governs the Project's delivery of apportioned water."). Yet, the existence of the Compact does not mean state law and other federal authorities no longer apply in the Lower Rio Grande.

Texas's argument is predicated on its understanding that the Compact is inherently inconsistent with New Mexico's administration of water below Elephant Butte. But Texas offers no concrete examples of this inconsistency, and neither the United States nor New Mexico share that understanding. Rather, as discussed in New Mexico's exceptions, by incorporating the Project as the mechanism for distributing the apportionment of water to southern New Mexico and Texas, the

States envisioned administration of the Project within New Mexico consistent with the Compact.

Texas also cites no authority in support of its novel theory that the existence of a compact apportionment means the doctrine of equitable apportionment supersedes reclamation law and state law, and its view is contradicted by this Court's precedents. For example, *Nebraska v. Wyoming* held that the United States was bound by Section 8 and other provisions of the Reclamation Act in its operation of the North Platte Project, despite the apportionment the Court implemented in that case. *See* 325 U.S. 589, 611-16 (1945). Indeed, if the Court accepts Texas's view that only the doctrine of equitable apportionment applies to Reclamation projects distributing apportioned water, Texas Reply at 40-41, many federal reclamation projects in the West will no longer be bound by state law or reclamation law.

Texas also argues *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), prohibits application of state law to water that "has already been equitably apportioned under the Rio Grande Compact." Texas Reply at 32. As a basis for this claim, Texas asserts that "*Hinderlider* provides that 'state law applies only to the water which has not been committed to other states by equitable apportionment.'" *Id.* (incorrectly quoting *Hinderlider*, 304 U.S. at 106-08, whereas the quoted language does not appear in that case). Texas's characterization of *Hinderlider* is mistaken. *Hinderlider* does not hold that apportionment displaces state law, but provides merely that,

whether an apportionment among States is made by compact or by this Court's decree, it is "binding upon the citizens of each State." 304 U.S. at 106. As New Mexico explained in its exceptions, *Hinderlider* clearly recognizes that state law and administration is necessary to ensure an equitable apportionment is effectively implemented. N.M. Br. at 42-45.

The quotation Texas attributes to *Hinderlider* is in fact from the Colorado Supreme Court case *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 922 (Colo. 1983) ("*Alamosa-La Jara*"). Taken in context, it is clear the *Alamosa-La Jara* court did not intend this statement to deprive a State of jurisdiction to engage in administration consistent with a compact. The court in that case recognized the authority of the Colorado State Engineer to regulate the use of water in Colorado, even water committed to other states by equitable apportionment. *See id.* at 935-36 (affirming certain rules but remanding others to the state engineer for consideration of Colorado laws requiring maximum utilization of water).

D. *Tarrant* Controls Interpretation of the Term "Deliver."

As New Mexico discussed in its exceptions, this Court's opinion in *Tarrant*, 133 S. Ct. at 2132-33, counsels against a reading of the Compact that would deprive New Mexico of the ability to administer water rights and otherwise apply its laws governing water use within its borders south of Elephant Butte. N.M.

Br. at 25-30. In response, Texas argues that *Tarrant* is inapplicable here because it is factually distinguishable from the present situation. Texas Reply at 30. However, Texas presents no compelling reason for the Court to disregard *Tarrant* here.

Texas argues the Compact is not silent on uses of water below Elephant Butte because Article IV requires New Mexico to "deliver" water to Elephant Butte. *Id.* at 31. However, the term "deliver" does not expressly define or control uses of water in the Lower Rio Grande. While the parties agree the use of "deliver" in Article IV requires New Mexico to physically convey specified quantities of water to Elephant Butte, they disagree regarding the legal implications thereafter of the term "deliver." *Tarrant* is clearly relevant to the question of whether this term can be interpreted so broadly as to deprive New Mexico of any jurisdiction over this water, a position advocated by Texas and adopted by the Special Master. *Tarrant* does not forbid a State from divesting itself of jurisdiction via compact, but such a concession must be express. *See* 133 S. Ct. at 2133. The Compact contains no such express declarations.

E. The Court Should Consider the Arguments Raised in *Amicus* Briefs Filed in Support of New Mexico.

Texas asserts the arguments submitted by *amici* Las Cruces and ABCWUA should be rejected because they are inconsistent with New Mexico's arguments.

Texas Reply at 42-45. Texas then urges the Court to deny the motions for leave to file of NMSU and NMPG because their arguments are duplicative of New Mexico's arguments. *Id.* at 46-48. Texas misconceives the point of *amicus* briefs. The fact that some *amici*'s arguments may diverge from or supplement New Mexico's arguments, while still supporting New Mexico, illustrates that they have distinct interests that should be considered by the Court.

Texas also argues the Court should deny NMSU's and NMPG's motions for leave to file because of its decision to withhold consent, which was granted by all other parties. *Id.* While a motion for leave to participate as an *amicus curiae* may generally be disfavored when a party withholds consent, U.S. Sup. Ct. R. 37.2(b), the Court has suggested it applies a more relaxed standard to *amici* participation in original actions. *See South Carolina v. North Carolina*, 558 U.S. at 288 (Roberts, C.J., concurring in part and dissenting in part); *see also* Joseph D. Kearney and Thomas W. Merrill, "The Influence of *Amicus Curiae* Briefs on the Supreme Court," 148 U. Pa. L. Rev. 743, 762 (Jan. 2000) (noting that the Court's "current practice in argued cases is to grant nearly all motions for leave to file as *amicus curiae* when consent is denied by a party"). Texas provides no compelling reason for the Court to deny the participation of *amici* supporting New Mexico while allowing the participation of *amici* supporting Texas.

Moreover, denying NMPG leave to participate as an *amicus* would deprive southern New Mexico farmers of their voice by leaving EBID, an entity taking a position at odds with NMPG's interests, as the sole *amicus* purporting to represent farmers' interests.[3] The Court should reject Texas's attempt to prevent the voices of these *amici* from being heard in this case.

III. Response to Colorado

New Mexico agrees with Colorado that the United States should not be allowed to bring Compact claims in this proceeding. The United States is neither a party to the Compact nor a third-party beneficiary of the Compact. Its participation in this case is necessary to bind it to the decrees of this Court, but that does not give it the authority to bring Compact claims of its

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[3] While an *amicus* need not agree with its State party on all points, a political subdivision of a State may not directly contravene the State that represents it. *Amicus* EBID has crossed that line here. New Mexico does not dispute EBID's right to file its *amicus* brief, but the Court should disregard EBID's arguments. This Court has consistently found that a "state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all of its citizens.'" *New Jersey v. New York*, 345 U.S. 369, 372 (1953) (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930)). For this reason, the Court has not allowed States in original actions to be "judicially impeached on matters of policy by [their] own subjects." *Id.* The Special Master correctly observed that "EBID's intention to impeach its own State . . . is offensive to the notion of sovereign dignity and prohibited by the doctrine of *parens patriae*." Report at 227 (citing *New Jersey v. New York*, 345 U.S. at 373). The Court should not entertain the effort of EBID to express policy disagreements with its State by offering arguments in support of its State's opponent.

own. For the reasons Colorado and New Mexico articulated in their Replies, the Court should not permit the United States to bring claims under the Compact.

A. Colorado Is Correct That the Compact Does Not Grant the United States a Cause of Action

Colorado correctly argues that the Compact has no effect on the 1906 Convention. Colo. Reply at 3, 5 (citing Compact Arts. I(l), XVI). Colorado also points out that the Compact clearly separates treaty obligations and Compact allocations of water to the States. *Id.* at 4-5 (quoting Compact Art. XIV). The Compact therefore did not add Compact remedies to the remedies that pre-existed the Compact, under which the United States could address any alleged violations of the 1906 Convention.

Similarly, Colorado is correct in stating that the Compact did not provide to the United States any additional Compact remedies to protect the Project. *See id.* at 6-7 (citing Compact Arts. VI, VII and VIII to demonstrate the Compact focused on the protections and powers of the compacting States, not on the United States or on the Project). The Compact relied on the existing Project as a practical means for delivery of water, but it is an agreement among the compacting States alone. Specifically, New Mexico agrees with Colorado's summary of key provisions in the Compact as defining the relationships between the States, not defining United States' claims:

> [The Compact's] terms are designed to implement the apportionments among the States, not to create separately enforceable federal rights. For example, pursuant to Compact Article VI, a spill from Elephant Butte Reservoir erases debits accrued *by Colorado and New Mexico*. Compact Article VII triggers storage limitations *in Colorado and New Mexico* above Elephant Butte Reservoir when project storage falls below 400,000 acre feet, unless other conditions exist. Under Compact Article VIII, *Texas* may request release of some storage waters to bring Project storage up to a volume of 600,000 acre-feet by March first. These portions of the Compact define the *States'* upstream obligations, and relief therefrom, based on volumes of water stored in and released from the Project.

Id. at 6-7 (emphasis in original). Accordingly, the Compact did not, as the United States argues, add Compact remedies to the remedies that pre-existed the Compact under which the United States could address any alleged interference with the Project. *See id.* at 8-10 (demonstrating that none of the cases on which the United States relies support its novel theory that it may sue under a compact to protect federal interests independent of the compacting States).

B. Colorado Is Correct That the Compact, As a Contract Among States, Does Not Make the United States a Third-Party Beneficiary

Colorado's repudiation of the United States' claim that it is a third-party beneficiary of the Compact is well-founded. *Id.* at 10-13 (demonstrating that the United States has failed to show that the parties to the Compact intended directly to benefit the United States). The beneficiaries of the Compact are the compacting States. The beneficiaries of the Project are the water rights owners. The United States has avenues outside the Compact for the protection of federal interests.

CONCLUSION

To avoid future confusion in this case, and to avoid approving an erroneous interpretation of the Compact that would unnecessarily strip New Mexico of sovereignty over its water resources, the First Interim Report of the Special Master should not be adopted. Instead, the Court should deny the Motion to Dismiss Texas's Complaint, enter an order stating that any findings or conclusions specified in the Report are not the law of the case, and recommit the case to the Special Master for further proceedings.

Further, the Court should overrule the United States' exception to the Special Master's recommendation that the United States' Complaint should be dismissed to the extent it raises Compact claims.

Respectfully submitted,

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